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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1566

SARGENT-WELCH SCIENTIFIC COMPANY, *Petitioner*

vs.

VENTRON CORPORATION AND VENTRON INSTRUMENTS CORPORATION, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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Pursuant to Rule 24(5) of the Revised Rules of this Court, Sargent-Welch Scientific Company respectfully submits this supplemental brief in support of its pending petition for a writ of certiorari. This brief discusses the relevant parts of the opinion in *United States* v. *United States Gypsum Co.,* U.S. Sup. Ct., O.T. 1977, No. 76-1560 (June 29, 1978), which was handed down after the petition was filed.

In *Gypsum,* this Court differentiated between the elements of proof in civil and criminal actions charging restraint of trade or "illegal monopolization" in

violation of the Sherman Act, 15 U.S.C. §§ 1, 2. Slip. Op. 13-14. On the civil side, the decision left "unchanged the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect." *Id.* at 11 fn. 13. As to criminal violations, however, the Court required proof of an unlawful purpose. But even in the criminal context, the Court rejected the notion that proof of unlawful purpose required "a demonstration that the disputed conduct was undertaken with the 'conscious object' of producing [anticompetitive] effects" (*id.* at 19) or with "a conscious desire to bring them to fruition or to violate the law" (*id.* at 21). Instead, the Court concluded—

> that action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws. *Id.* at 20.[1]

We contend that the Seventh Circuit erred as a matter of law by imposing upon petitioner in this civil antitrust action a more stringent burden of proving unlawful purpose than this Court deemed appropriate for criminal cases.

The critical issue before the Seventh Circuit was whether respondents' Cahn division had "violated § 2 of the Sherman Act by unilaterally using [its] monopoly power in microbalances to force unwanted millibalances on its dealers" (Pet. App. C, p. 14a

[1] In a footnote to the quotation in the text, the Court reaffirmed earlier holdings that conduct undertaken with the purpose of producing anticompetitive effects also can be criminal, "even if such effects did not come to pass. Cf. *United States* v. *Griffith*, 334 U.S. 100, 105 (1948)." Slip Op. 20 fn. 21.

(fn. omitted)). Sargent-Welch proved that it and the other Cahn microbalance dealers who refused to handle Cahn's millibalances were terminated pursuant to Cahn's dealer reduction program, while "all the Cahn dealers who survived the dealer reduction program carried millibalances" (Pet. App. C, p. 23a fn. 22). Each terminated dealer was advised by Cahn that one reason for its termination was the dealer's refusal to carry the millibalance line (Pet. 7-8); and, in Sargent-Welch's case, Cahn admitted that this fact was "very important" (PTX 9, A. 70). Sargent-Welch also proved—and the district court specifically found—that the "motive" for and the "objective" of Cahn's dealer reduction program was to do business through "full line" dealerships, *i.e.*, those which carried Cahn's line of millibalances as well as its line of microbalances (Pet. App. F, p. 37a).

Sargent-Welch proved, in sum, that Cahn's conscious objective was to have full line dealers—and that its objective was achieved, for only full line dealers survived the dealer reduction program. Moreover, the Seventh Circuit recognized that full line forcing by a monopolist would be an anticompetitive misuse of monopoly power (see Pet. App. C, pp. 14a-15a). The court concluded, however, that respondents would not be liable unless Cahn's "purpose" was "to further sales of millibalances to surviving dealers by causing them to fear that unless they handled millibalances they would not be able to buy microbalances" (Pet. App. C, p. 22a). The court thus ruled, as a matter of law, that petitioner's proof of Cahn's general purpose (desire or motive) to achieve an inherently anticompetitive end was insufficient to establish a violation of the Sherman Act, § 2.

That ruling is inconsistent with the holding of *Gypsum* that antitrust liability predicated on unlawful intent follows as a matter of law from proof that "'the defendant desired or merely knew of the practical certainty of the [anticompetitive] result.'" Slip. Op. 20. It also is inconsistent, as we argue in the petition, with the holding of *United States* v. *Griffith,* 334 U.S. 100, 106-107 (1948), that where monopolization is "a necessary and direct result" of a defendant's acts he is chargeable in legal contemplation with the requisite unlawful intent under § 2 of the Sherman Act.

The issue framed by the petition is squarely presented at this stage of the litigation, and a judgment in petitioner's favor would conclude the liability aspects of this case, which already is 5½ years old. For the district court to make further findings that are irrelevant under *Gypsum* and *Griffith,* and then for the appellate process to begin anew regardless of who prevails (see Br. in Opp. 2 fn. 1), would serve only to delay the ultimate disposition of the case without sharpening the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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